Supreme Court, U.S.
FILED

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IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KENNETH C. STAHL,

Petitioner

v.

JAMES WOOLSEY, DIRECTOR OF THE C.I.A.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTION PRESENTED

1. Whether the Court of Appeals sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings.

LIST OF PARTIES

All the parties in the United States Court of Appeals for the Eleventh Circuit are listed in the caption.

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"The Court has departed from the accepted and usual course of judicial proceeding which has denied a litigant the consideration of the merits of his claim against a United States government agency".

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth C. Stahl, prays that a writ of certiorari issue to review the judgment and opinon of the United States Court of Appeals for the Eleventh Circuit, entered in the within proceeding on September 25, 1996.

OPINION BELOW

The opinion of the Court below is reproduced in Appendix A of this Petition. The Orders of the District Court are reproduced in Appendix B, C & D.

JURISDICTION

The opinion of the Court of Appeals was entered September 25, 1996. The jurisdiction of this court rests upon 28 U.S.C. # 1254 (1).

STATUTES INVOLVED

The statutes involved are set forth in Appendix C. They are: Section 706

(f) (1), Title VII, Civil Rights Act of 1964, 42 U.S.C. # 2000e- 5 (f) (1). Appendix C. U.S. Constitution 5th Amendment.

STATEMENT OF THE CASE

Plaintiff, a white male, filed this action in October, 1993 in the United States District Court in North Carolina alleging that he was unlawfully discriminated against because of his race and sex and was subjected to reprisal for complaining about unlawful discrimination.

On August 8, 1994, the action was transferred to the Southern District of Florida. Plaintiff had difficulty securing local counsel to and or participate in his case. In the progress of the litigation, the District Court issued a Show Cause Order on December 5, 1995.

Appendix "B" requiring a response within eleven (11) days. On December 8, 1995, prior to any response by plaintiff, the District Court issued an Order dismissing plaintiff's case. (Appendix "C") In response to plaintiff's Motion to Vacate, the District Court denied that Motion on February 7, 1996. (Appendix D) The Court noted that the primary grounds set forth by plaintiff was the harsh result of Dismissal With Prejudice, when in fact this was not dismissed with prejudice (Appendix "D"). The case was appealed to the United States Court of Appeals for the Eleventh Circuit where it was affirmed. (Appendix "A")

REASONS FOR GRANTING THE WRIT

THE COURT HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING WHICH HAS DENIED A LITIGANT

THE CONSIDERATION OF THE MERITS OF HIS CLAIM AGAINST A UNITED STATES GOVERNMENT AGENCY.

The Court's order of February 7, 1996, took note of plaintiff's assertion that dismissal with prejudice was a harsh result by stating the Court's position that plaintiff's action was not dismissed with prejudice. (Appendix "D") However, if a Title VII complaint is timely filed pursuant to the Equal Employment Opportunity Commission's (EEOC) Right to Sue Letter and is later dismissed, the timely filing of the complaint does not toll the limitation period. Berry v. CIGHA/RSICIGHA, CA5 (Tex), 1992, 975 F. 2d 1188.

Since the action cannot be refiled because of limitation problems, the standard of review of the District

Court's dismissal should be the same as is used in reviewing a dismissal with prejudice. Gray v. Fidelity Acceptance Corp. (5Cir) 634 F. 2d 226. The Eleventh Circuit in McKelvey v. AT & T Technologies, Inc. 789 F. 2d 1518 at 1520 state the standard thusly:

"The decision to dismiss for want of prosecution lies within the trial court's discretion and can be reversed only for an abuse of discretion. However, the severe sanction of dismissal-with-prejudice or the equivalent thereof--should be imposed "only in the face of a clear record of delay or contumacious conduct by the plaintiff." Moreover, such dismissal is a sanction of last resort, applicable only in extreme circumstances, and generally proper only where less drastic sanctions are unavailable. A

finding of such extreme circumstances necessary to support the sanction of dismissal must, at a minimum, be based on evidence of willful delay; simple negligence does not warrant dismissal." Citations Omitted

Plaintiff had difficulty in securing local counsel and during a period of limited court filings activity did take place. Plaintiff had serious unresolved disclosure issues because of his prior employment with the C.I.A.

Delays by counsel may be negligent but these actions did not rise to the level of willful and/or contamacious conduct. The Eleventh Circuit has clearly stated that because dismissal is considered a drastic sanction, a district court may only implement it, as a last resort, when: (1) a party en-

gages in a clear pattern of delay or willful contempt; and (2) the district court specifically finds that lesser sanctions would not suffice. World Thrust Films v. Intern. Family Entertainment, 41 F. 3rd 1454.

Moreover, the Court in the instant case did not even consider less drastic sanctions for non-compliance, but merely concluded that the order was without prejudice in response to plaintiff's challenge. (R1-48-1)

Dismissal with prejudice is proper only where a lesser sanction would not serve the interest of justice. See Goforth, 766 F. 2d at 1533.

The district court did not indicate in its order that it had even considered lesser sanctions, much less found that justice dictated dismissal.

The district court in this instance abused its discretion. Cohen v. Carnival Cruise Lines, Inc., 762 F. 2d 923, World Thrust Films Supra.

CONCLUSION

The court of appeals, by its ruling, has sanctioned a departure from the usual course of judicial proceeding and denied a litigant the opportunity for his day in court.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

Dated: December 20, 1996

APPENDIX A

Filed September 25, 1996

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-4353

KENNETH C. STAHL,

Plaintiff-Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(D.C. NO. 94-1605-CIV)

Before: KRAVITCH, COX and BARKETT,

Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 25, 1996
For the Court: Miguel J. Cortez,
Clerk
By: "s/ Matt Davidson "
Deputy Clerk

ISSUED AS MANDATE: 11/18/96

(file stamp)

Filed
U.S. Court of Appeals
Eleventh Circuit
SEP 25 1996
Miguel J. Cortez
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

Case No. 94-1605-CIV-UNGARO-BENAGES

KENNETH C. STAHL,

Plaintiff,

vs.

R. JAMES WOOLSEY, DIRECTOR
OF THE CENTRAL INTELLIGENCE AGENCY,

Defendant.
_____/

ORDER TO SHOW CAUSE

THIS CAUSE came before the Court upon sua sponte examination of the record.

THE COURT has considered the pertinent portions of the record and the last recorded date of various proceedings. It appears this case has been pending without any proceedings having been taken for more than three months. Therefore, it is

hereby

ORDERED AND ADJUDGED that the plaintiff shall file a response with the Court no later than eleven (11) days from the date of this Order, to show cause why this case should not be dismissed for failure to prosecute pursuant to S.D. Fla. Gen. R. 41.1 and Fed. R. Civ. P. 41(b). If plaintiff fails to file such response, this action WILL be DISMISSED without further order of this Court.

DONE AND ORDERED in Chambers at Miami, Florida, this 5 day of December, 1995.

"s/Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
Magistrate Judge Johnson
Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

Case No. 94-1605-CIV-UNGARO-BENAGES

KENNETH C. STAHL,

Plaintiff,

vs.

R. JAMES WOOLSEY, DIRECTOR
OF THE C.I.A.,

Defendant.
_____/

ORDER DISMISSING CASE

THIS CAUSE came before the Court upon sua sponte examination of the record.

THE COURT has considered the pertinent portions of the record and the last recorded date of various proceedings. It appears that the Plaintiff failed to prepare the pretrial stipulation as

required by this Court's Order dated June 23, 1995. Furthermore, Plaintiff failed to appear at the Pretrial Conference before the undersigned scheduled for December 8, 1995 at 10:00 a.m. Finally, it appears that Plaintiff has failed to take any action to prosecute this case since May of 1995, and Plaintiff has failed to comply with the Court's Mediation Order dated December 7, 1994.

Based upon Plaintiff's repeated violations of the Court's Orders, the Court finds that Plaintiff's violations have been willful and intentional and that they evince an intention to abandon the action.

Therefore, it is hereby

ORDERED AND ADJUDGED that this case is **DISMISSED.**

DONE AND ORDERED in Chambers at Miami,

Florida, this 8 day of December, 1995.

"s/Ursula Ungaro-Benages"
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT
JUDGE

copies provided:
Magistrate Judge Johnson
Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

Case No. 94-1605-CIV-UNGARO-BENAGES

KENNETH C. STAHL,

Plaintiff,

vs.

R. JAMES WOOLSEY, DIRECTOR

OF THE C.I.A.,

Defendant.

_____/

ORDER DENYING PLAINTIFF'S MOTION TO VACATE

THIS CAUSE came before the Court upon Plaintiff's Motion to Vacate this Court's December 8, 1995 Order Dismissing the Case filed December 18, 1995.

THE COURT has considered the motion and the pertinent portions of the record, and is otherwise fully advised

in the premises. Plaintiff moves this Court pursuant to Fed. R. Civ. Pro. 60(b) to vacate its prior Order, dated December 8, 1995, dismissing this case. The case was dismissed on the grounds that Plaintiff failed to appear for a pretrial conference and that Plaintiff had repeatedly violated this Court's Orders. The Court finds that Plaintiff has failed to show any reason why this Court's prior Order should be vacated pursuant to Rule 60(b). The Court notes that the primary grounds set forth by the Plaintiff in support of the Motion to Vacate is the harsh result of Dismissal With Prejudice. This cause was not dismissed with prejudice. Accordingly it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 7 day of February, 1996.

"s/Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
Magistrate Judge Johnson
Counsel of Record